No. 10-548

FEB 25 2011

In The
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC.,
AND MINE RECLAMATION CORPORATION,

Petitioners,

v

NATIONAL PARKS &
CONSERVATION ASSOCIATION, *ET AL.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS DONNA CHARPIED, *ET AL.* IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the issue of harmless error, an issue never raised by any party in the Ninth Circuit, is appropriate for review by this Court.

2. Whether the Ninth Circuit's holding that the Bureau of Land Management (BLM) used a legally inadequate appraisal to justify a land exchange under the Federal Land Policy and Management Act (FLPMA) is adequate grounds for remand to the agency.

3. Whether the Ninth Circuit's determination that BLM failed to analyze an adequate range of alternatives under the National Environmental Policy Act (NEPA) is adequate grounds for remand to the agency.

4. Whether the Ninth Circuit's determination that BLM failed to take a "hard look" at a project's impacts pursuant to NEPA is adequate grounds for remand to the agency.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties listed in the caption, the following were parties in the court of appeals:

Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice; Bureau of Land Management; United States Department of Interior; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service.

RULE 29.6 STATEMENT

Desert Protection Society and Center for Community Action and Environmental Justice represent that neither has a parent corporation and no publicly held corporation owns any interest in either of them.

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STATEMENT OF THE CASE

In September 1997, the Bureau of Land Management ("BLM") issued a Record of Decision ("ROD") in which it approved petitioners Kaiser Eagle Mountain, *et al.*'s (collectively "Kaiser's") development of a 4,654-acre landfill directly adjacent to Joshua Tree National Park (Joshua Tree). Appendix to Petition for a Writ of Certiorari ("Pet. App.") E Accepting trash six days a week, for up to 16 hours each day, the dump as approved would receive a total of 708 million tons of garbage in its 117-year life span. Pet. App. 6. Joshua Tree cradles the site on three sides, is separated from the proposed dump by a mere one-and-a-half miles, and includes viewsheds that look directly into the proposed dump. *Id.*

Joshua Tree is a 794,000-acre national park that has been declared an International Biosphere Reserve by the United Nations. It is a designated Class I airshed under the Clean Air Act and provides important habitat for bighorn sheep, desert tortoises, deer, coyotes, bobcats, mountain lions, and numerous species of birds and reptiles. Pet. App. 101. In 1994, citing the need to protect Joshua Tree from "incompatible development and inconsistent management of . . . contiguous Federal lands of essential and superlative natural, ecological, archeological, paleontological, cultural, historical, and wilderness values," Congress affirmed Joshua Tree's status as a nationally significant area by designating it a National Park. 16 U.S.C. § 410aaa-21(3) (2007). In Congress' own words, Joshua Tree is "a public wildland resource of extraordinary

and inestimable value for this and future generations." *Id.*

As a part of the development plan for its landfill on the borders of Joshua Tree, Kaiser proposed a land exchange with BLM. Pet. App. 5-6. To facilitate this proposal, BLM commissioned an appraisal from David J. Yerke, Inc. ("Yerke appraisal") to evaluate the value of the exchanged lands. The Yerke appraisal explicitly disregarded the proposed use of the exchanged lands when making its assessment, stating "that it did 'not take into consideration any aspects of the proposed landfill project'" when evaluating the highest and best use for the land. Pet. App. 7. This resulted in an appraisal of the public lands in question at a value *less than 1%* of what they are actually worth. Pet. App. 8.[1]

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[1] As the Ninth Circuit highlighted in its opinion, the Yerke appraisal valued the land at $77 an acre, while the Los Angeles County Sanitation District "has since entered into a conditional agreement to purchase the landfill property and permits for over $8,800 per acre." Pet App. 8, fn. 1. In response, *amicus curiae* County Sanitation District No. 2 of Los Angeles County (LA Sanitation) claims that the $8,800 price per acre reflects the price for a "fully permitted project, free of litigation." LA Sanitation *Amicus* Brief, 5, fn. 2. This response, however, fails to address the appraisal's fundamental flaw, "the appraiser's wilful ignorance" that the land would be used as a landfill and therefore had a significantly higher value than empty desert acreage. Pet. App 18. Even discounting the purported "fully permitted" component of the deal, LA Sanitation's desire to purchase the landfill property at a price over *100 times higher* than $77 demonstrates that the Yerke appraisal's refusal to consider landfill use of the land was unreasonable.

In July 1996, BLM released a Draft Environmental Impact Statement ("DEIS") addressing the proposed landfill. The National Park Service ("NPS") was designated a "cooperating agency" with "special expertise" for purposes of BLM's NEPA review of the landfill. Appendix to Brief for Respondent Donna Charpied, *et al.* in Opposition ("Charpied App.") 2; *see* 40 C.F.R. § 1508.5. During NPS's initial review, it called on BLM to reject the proposal, stating its preference for the "No Action Alternative." Charpied App. 8. Specifically, NPS determined that: (1) eutrophication, public health and safety, impacts to the desert tortoise and bighorn sheep, vectors and disease, wilderness and the wilderness experience, and air quality are all significant impacts of the dump that *cannot be adequately mitigated* (Charpied App. 10-15); (2) the alternatives analysis was woefully inadequate (Charpied App. 7-8); and (3) "the FEIS/EIR must reference that the possibility exists for *significant, irreversible environmental changes* at Joshua Tree National Park" (Charpied App. 15, emphasis added). These comments were produced "by specialists at Joshua Tree National Park, System Support Office, Field Director's Office, National Resource Program offices, and Washington levels," as part of NPS' obligations as a cooperating agency with special expertise in Joshua Tree resources and management. Charpied App. 5-6.[3]

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[3] In December 1996, NPS for purely political reasons reversed its position on the dump, but did *not* withdraw its comments

(Continued on following page)

Despite NPS' dire warnings, BLM issued a Final Environmental Impact Statement ("FEIS") in January 1997, and thereafter approved the project. On December 22, 1999, respondents Donna Charpied, Laurence Charpied, Desert Protection Society, and Center for Community Action and Environmental Justice (collectively "Conservation Groups") filed the present lawsuit seeking to enjoin the construction of the landfill.

In a lengthy and well-reasoned opinion (Pet. App. B), the United States District Court for the Central District of California, Eastern Division, determined that BLM's approval violated both FLPMA and NEPA. First, it held that BLM had failed to comply with FLPMA's land appraisal requirements because it ignored landfill use in its analysis of the highest and best use of the exchange lands, stating: "BLM's failure to consider an income producing landfill as a potential highest and best use was an abuse of discretion, given that evidence available prior to the undertaking of the appraisal indicated that *the selected lands were expected to be used for landfill purposes.*" Pet. App. 119, emphasis added. The district court also held that BLM's approval violated NEPA because its EIS defined the purpose and need of the project too narrowly and thereby eliminated alternatives to the dump that should have been considered Pet. App.

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regarding the devastating and irreversible impacts of the project on Joshua Tree resources. Pet App. 34

132-135. Based on its determination that BLM's alternatives analysis was deficient, the court stated that remand was important to provide BLM an opportunity to "consider . . . reasonable alternatives to the proposed land exchange and land interest grants which are more environmentally benign and will effectuate the primary purpose and need of generating long-term landfill capacity for Southern California." Pet. App. 135. The final serious flaw described by the district court was that BLM did not take a hard look in its EIS at the eutrophication impacts of the dump, including both "atmospheric nitrate deposition" and "large-scale addition of nutrients . . . to the desert ecosystems." Pet. App. 122-125.

The Ninth Circuit Court of Appeals upheld the district court's opinion on all three of these grounds. First, the Court ruled that BLM's appraisal of the public lands Kaiser sought to acquire inadequately assessed its highest and best use. Pet App. 15-20. Following requirements set forth in applicable statutes, regulations, and the Uniform Appraisal Standards for Federal Land Acquisitions, the Court defined a proper appraisal as one that fairly analyzes the "'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.'" Pet. App. 15-16 (*quoting* The Appraisal Institute, *Uniform Appraisal Standards for Federal Land Acquisitions* (2000) 34). The Court also relied on *Desert Citizen Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), a case in which – just as here – BLM ignored the obvious

"highest and best use" of the land in question and assigned to it instead a falsely deflated value. Pet. App. 16-17. In the present case, the drafters of the Yerke Appraisal were aware of the landfill project, yet explicitly declined to take "'into consideration any aspect of the proposed landfill project.'" Pet. App. 18. Based on the presence of other landfill projects in the area, the Court found that "the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration." Pet. App. 20.

The Ninth Circuit also affirmed the District Court's holding that the purpose and need statement in the EIS was improper because the majority of the purposes and needs corresponded to Kaiser's goals rather than the goals of BLM. Pet. App. 27-28. As the Ninth Circuit stated, meeting long-term landfill needs is a valid public purpose, but long-term income sources for Kaiser and its fee successors, finding a viable use for mine byproducts located on private land holdings, and long-term development plans for Kaiser's town site are all *private* objectives. *Id.* In arriving at this conclusion, the Court relied in part on the Department of the Interior's NEPA handbook, which *explicitly excludes* consideration of such interests in all statements of purpose and need: (1) "the purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need. . . .*" (emphasis in the original) and (2) "[t]he applicant's purpose and need may provide useful

background information, but this description must not be confused with the BLM purpose and need for the action. . . . It is the BLM purpose and need for action that will dictate the range of alternatives. . . ." Pet. App. 26-27, *quoting* the Department of Interior's NEPA Handbook.

The Ninth Circuit further held that the agency's statement of purpose and need improperly constrained the agency's analysis of project alternatives:

> BLM proposed several alternatives that would have been responsive to the need to meet long-term landfill demand, . . . [but] did not consider these options in any detail because each . . . failed to meet the narrowly drawn project objectives, which required that Kaiser's private needs be met.

Pet. App. 28. Thus, by adopting an excessively narrow purpose and need statement, BLM cut off a searching analysis of alternatives and foreordained approval of the exchange and construction of the dump on Kaiser's chosen site. Pet. App. 28-29. As the Ninth Circuit's opinion accurately points out, all of the so-called alternatives addressed in the EIS "would result in landfill development of some sort and would require some portion of the land exchange to occur." Pet. App. 28. BLM excluded all real alternatives to the project, including all offsite alternatives, based on Kaiser's desire to locate the dump on its old mine site, reap long-term income from use of the site, and acquire rights to and use of the nearby town site. *Id.* Accordingly, the Court concluded that BLM's exclusive

reliance on Kaiser's economic objectives, instead of the needs of BLM and of the public, violated NEPA. *Id.*

In addition to Conservation Groups and others who submitted comments, NPS in its capacity as cooperating agency repeatedly called for an analysis of alternatives that were not adjacent to Joshua Tree:

> . . . the NPS requests the [FEIS] include a detailed comparison of competing regional projects and their relative long-term impacts. . . . [¶] *Only with such a comparison and analysis can the impacts of siting the proposed landfill adjacent to a National Park and a designated wilderness area be fully evaluated* . . . [¶] All reasonable alternative landfill sites must be evaluated as options to the proposed project, even if [BLM does] not feel [it] has jurisdiction to approve other proposed landfill sites in the Southern California region.

Charpied App. 6-8, emphasis added. Accordingly, BLM's failure to consider a reasonable range of alternatives is a profound omission in the EIS that precluded informed public participation and agency decisionmaking. Pet. App. 29. The Ninth Circuit accordingly ruled that BLM must rectify this omission on remand. *Id.*

Finally, the Ninth Circuit found that the EIS contained "no specific discussion of eutrophication," and that the scattered and imprecise treatment that does exist in the EIS did not constitute a hard look at the issue. Pet. App. 31-32. Contrary to the ill-informed

and self-serving claims of *amicus* LA Sanitation that eutrophication is "an invented concept," eutrophication is a complex scientific process that can cause extensive damage to natural resources in areas surrounded by proposed dumps. As explained by NPS' experts in its formal comment letter:

> [E]utrophication is a form of human input of energy and nutrients that has potential for affecting the long-term ecosystem function of Joshua Tree National Park. It would be irresponsible to ignore these long-term and subtle threats in the face of a clear legal mandate to consider future public enjoyment and the need to preserve resources unimpaired for future generations.

Charpied App. 24.

NPS further describes the many different sources of nutrients that would result from the daily importation of 20,000 tons of trash into the desert, and explained that "[i]n the desert where resources are scarce, even small amounts of nutrients are highly attractive to animals and alter wildlife behavior." Charpied App. 19. Specifically, NPS identified many contributors to eutrophication including working landfill areas open to small animals, wind-blown trash, train tracks and roads as sources of dead animals for scavengers, storage and work areas where trash is dumped for spread and compact operations, and various human activities associated with working at and supporting the workers of the landfill. Charpied App. 18-20. Further, as noted by the Ninth Circuit, the

Interior Board of Land Appeals ("IBLA") similarly recognized the significance of the eutrophication issue in its review of BLM's decision. Pet. App. 32, fn. 13.

The Ninth Circuit adopted NPS' expert definition of eutrophication, describing it as the "introduction of nutrients into the desert environment," and held that the EIS in the present case "contains no specific discussion of eutrophication." Pet. App. 31. Based on this determination, the Ninth Circuit held that BLM's "discussion of eutrophication is neither full nor fair." Pet App 32 Rather than "flyspecking," the Ninth Circuit's opinion properly addresses significant inadequacies in the form and content of the EIS – inadequacies that were *specifically identified by NPS*, the cooperating agency with special expertise on the effects of eutrophication on desert ecosystems. Charpied App. 18-20, 24. The Court consequently held that the EIS failed to foster "'informed decision-making and informed public participation.'" *Id.*, *quoting State of California v. Block*, 690 F.2d 753, 761 (1982). The Court concluded that BLM's *post-hoc* "attempt to cobble together a 'hard look' from various other analyses" cannot "serve as a 'reasonably thorough' discussion of the eutrophication issue" and remanded to BLM for further analysis. Pet. App. 32.

ARGUMENT

Kaiser's petition presents to this Court a single, narrow question: whether the Ninth Circuit erred in

deciding to remand a land exchange undertaken by BLM to correct errors in its prior decision. Kaiser explicitly does *not* ask this Court to review the Ninth Circuit's uncontroversial declarations of FLPMA and NEPA jurisprudence (Petition for a Writ of Certiorari ("Pet.") i), namely: (1) that an agency's decision to undertake a land exchange under FLPMA must be supported by a valid, accurate appraisal that takes into account the federal exchange lands' highest and best use (Pet. App. 15-20), (2) that an agency may not define the purpose of a project so narrowly as to unduly limit consideration of all viable alternatives in its NEPA analysis (Pet. App. 23-29), and (3) that NEPA review of a project's impacts must contain a complete and accessible analysis of the significant impacts posed by the project (Pet. App. 31-33). Kaiser also does *not* dispute that BLM failed to adhere to these fundamental FLPMA and NEPA requirements when it approved the land exchange at issue here. Pet. 18.

Instead, Kaiser takes a different track. It argues that the Ninth Circuit was *required* to (1) deem harmless all of the errors in BLM's decisionmaking process and (2) determine *sua sponte* that further agency review of the project consistent with the Court's ruling would not – *could not under any circumstances* – alter BLM's previous decision to approve the land exchange. *Id.* Kaiser's petition is thus nothing more than a bald-faced request for a free pass, which would allow it to construct the proposed Eagle Mountain Landfill *despite* the significant FLPMA and NEPA violations identified by the Ninth Circuit. *Id.* This

request is based on a misapplication of the "harmless error" doctrine and is supported by *nothing more than Kaiser's own speculation* that BLM's future review of the project in light of a legally adequate appraisal and environmental analysis will turn out in its favor. *Id.* Kaiser's novel harmless error theory, if adopted by this Court, would create a new era of environmental litigation in which *even significant agency failings* could be disregarded based solely on a particular court's subjective determination that proceedings on remand would probably not impact the agency's final decision. Such a result would put judges in the seats of agency decisionmakers and emasculate enforcement actions under the nation's most venerable environmental statutes. Because judicial remand to fix significant errors in prior agency decisionmaking is not only appropriate but required by law, Kaiser's petition should be rejected.

In short, the Ninth Circuit's remand of BLM's approval conforms to required procedures and does not conflict with any decision of any other court, including this Court. Conservation Groups do not generally contest the validity of the holdings in the cases cited by Kaiser. Remand is not only in line with these cases, it is required by the statutory provisions upon which those Courts and the Ninth Circuit here based their decisions.

Furthermore, as discussed directly below, though Kaiser had ample opportunity, it nevertheless *failed to raise its harmless error arguments below* and should therefore be barred from raising them here.

I. Kaiser Failed to Raise Its Harmless Error Argument in the Ninth Circuit; Therefore This Court Should Not Grant Kaiser's Petition for a Writ of Certiorari

This Court routinely declines to hear issues that the lower courts did not have the opportunity to decide. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("We ordinarily 'do not decide in the first instance issues not decided below,'" *quoting National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999)). Kaiser had ample opportunity to raise the question of whether the errors identified by the District Court and Ninth Circuit were harmless – including, *e.g.*, in its petition for rehearing *en banc* before the Ninth Circuit – but chose *not* to do so. Charpied App. 25-26. This Court has held that issues which "were neither raised in nor passed upon by the Court of Appeals" will not normally be reviewed by the Supreme Court. *Glover v. United States*, 531 U.S. 198, 205 (2001); *see also, Youakim v. Miller*, 425 U.S. 231 (1976). Because Kaiser failed to provide the Ninth Circuit with an opportunity to address its harmless error theory, its petition should be denied as a matter of course.

II. The Cases Cited by Kaiser All Stand for the Unremarkable and Irrelevant Proposition That Courts Need Not Remand Decisions with Harmless Errors to Agencies for Purposeless Fixes

Conservation Groups agree that minor defects in agency decisionmaking do not always need to be remanded to the agency for further consideration. This is not a remarkable claim, nor are the following cases remarkable for upholding agency decisionmaking in the face of *de minimis* inconsistencies and harmless errors. Here, to the contrary, the Ninth Circuit identified significant statutory violations that directly impacted BLM's substantive decisions. The following harmless error cases cited by Kaiser are therefore inapplicable.

First, in *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759 (1969), this Court held that the National Labor Relations Board ("NLRB") issued an "unquestionably valid" order and that the respondent was obliged to comply with that order. *Id.* at 766 This Court determined, however, that the Board's citation to a previous NLRB decision as authority for its order was not the correct source of the Board's authority. *Id.* This Court held that remand to fix the citation – when the Board clearly had the authority to issue the order in the first place – "would be an idle and useless formality." *Id.* at 766, fn. 6. This Court concluded: "[t]here is *not the slightest uncertainty* as to the outcome" of such a "meaningless" remand and, therefore, this Court refused to

remand the case to the Board citing the harmless error doctrine. *Id.*, emphasis added.

Similarly, petitioner's reliance on *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*Home Builders*") is also misplaced because the challenged language in that case was a "stray statement, which could have had *no effect* on the underlying agency action being challenged." *Id.* at 659, emphasis added. In *Home Builders*, EPA had published a statement in the Federal Register claiming that consultation under the Endangered Species Act had been completed, while simultaneously taking a position that consultation was not required by the statute. The distinction between voluntary consultation and required consultation "was simply not germane to the final agency transfer decision." *Id.* The *Home Builders* Court thus echoed *Wyman* in stating that an error that did not impact the original administrative proceeding should not be remanded for meaningless re-processing and re-approval. *Id.* at 660.[3]

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[3] The other cases cited by Kaiser reiterate the same established principle. *Mass Trs. of E. Gas & Fuel Assocs v United States*, 377 U.S. 235, 248 (1964) (errors below did not have any bearing on "the procedure used or the substance of the decision reached"), *U.S. Telecom Ass'n v FCC*, 400 F.3d 29, 41-42 (D.C. Cir. 2005) (appropriately equivalent procedures utilized, making remand meaningless); *Sierra Club v Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (lack of notice in administrative proceedings cured where the relevant parties received constructive notice and there was "no credible reason why [such] omission . . . would affect the public's review of the proposal, or in any way change

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Kaiser's citation to various NEPA cases adds nothing new to this well-established harmless error rule. In *Nevada v. Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006), for example, the Department of Energy (DOE) omitted a one-sentence preferred alternative designation, which it later rectified by publishing the designation in the Federal Register with ample time for public comment. *Id.* at 444. The Court held that "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making was not frustrated by the absence of [the preferred alternative designation]." *Id.* at 444.[4] The other NEPA cases Kaiser cites similarly repeat the uncontested but irrelevant harmless error rule.[5]

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the comments made by them"); *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (minor vulnerabilities in the opinion of an administrative law judge did not require remand).

[4] Furthermore, the *Nevada* Court implied that the alleged absence of the designation was likely not a NEPA violation because DOE had in fact identified a preferred alternative; plaintiffs there simply wanted more specificity regarding that preferred alternative. *Id.* at 443-444.

[5] *Illinois Commerce Commission v. Interstate Commerce Commission*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (Remand "was not necessary to guarantee that the Commission will consider environmental concerns" prior to proceeding with the project because the agency was required to conduct further environmental analyses before any substantive action affecting the environment could proceed); *Friends of the River v. Federal Energy Regulatory Commission*, 720 F.2d 93, 106 (D.C. Cir. 1983) (Analysis missing in the EIS was performed by the agency prior to the conclusion of the decisionmaking process; therefore remand would serve only a "punitive" purpose, not the informational

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Further there is no Circuit split on this issue (Pet. 25) because the Ninth Circuit routinely applies the harmless error rule in parallel contexts. For instance, in *Laguna Greenbelt, Inc. v. U.S. Dept. of Transp.*, 42 F.3d 517 (9th Cir. 1994), the Ninth Circuit held that an agency's failure to accurately disclose a toll road's impact in an EIS was harmless error because it did not adversely impact NEPA's informational purposes. Similarly, in *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764 and 769 (9th Cir. 1986), the Court held that the agency's notice did not comply with FLPMA procedures, but the error was harmless because the purpose of the notice was accomplished and the public had ample opportunity to comment. In *Del Norte County v. U.S.*, 732 F.2d 1462, 1466-1467 (9th Cir. 1984), the Court determined that the integrity of the agency's decisionmaking process and the public's ability to comment on the project had not been compromised by the agency's failure to publish its notice in the Federal Register at the precise time prescribed by NEPA. And finally, in *Riverbend*

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goal of NEPA); *Save Our Heritage, Inc. v. Federal Aviation Administration*, 269 F.3d 49, 61-62 (1st Cir. 2001) ("Remanding for a differently named assessment, where the project's negative consequences have already been analyzed and found to be absent and the findings have been disclosed to interested parties, is a waste of time"); *Glisson v. United States Forest Service*, 138 F.3d 1181, 1183 (7th Cir. 1998) (Remand for minor revision to findings would be futile); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1129 (8th Cir. 1999) (failure of agency to analyze alternatives that are not "viable" is harmless error)

Farms, Inc. v. Madigan, 958 F 2d 1479, 1488 (9th Cir 1992), the Ninth Circuit held that "[t]he Secretary's failure to comply with the specific dictates of the APA's notice and comment requirements is harmless." These cases demonstrate that no Circuit split exists. Far from ignoring the harmless error rule, the Ninth Circuit has embraced it and incorporated it into its jurisprudence along with her sister Circuits.

III. The Violations of FLPMA and NEPA Identified by the Ninth Circuit Are Not Harmless Errors and Therefore Remand Is Required

The APA requires courts to "compel agency action unlawfully withheld or unreasonably delayed" and to "hold unlawful and set aside agency action, findings, and conclusions found to be [ ] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)-(2)(A). In accordance with this command, courts have consistently remanded cases to agency decisionmakers for errors that rise above the harmless error standard. *See, e.g., Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 102 (2d Cir 1970); *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 779-80 (10th Cir. 2006).

FLPMA governs public land management under Congress' mandate that federal agencies pursue their management responsibilities "in a manner that will protect the quality of scientific, scenic,

historical, ecological, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). Under the APA, agency actions which violate FLPMA must be vacated and remanded where they rise above the harmless error standard. *Center for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 647 (9th Cir. 2010) (remanding BLM's designation of a proposed land exchange because its public interest determination under FLPMA was arbitrary and capricious).

NEPA is a public information statute. The purposes of NEPA's environmental review requirements are "to ensure both that an agency has information to make its decision and that the public receives information so it might also play a role in the decisionmaking process." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004). As with violations of FLPMA, agency actions which violate the procedural guarantees of NEPA and rise above the threshold of harmless error must be vacated and remanded by reviewing courts. *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

Each NEPA and FLPMA violation identified by the Ninth Circuit in the present case constitutes a significant error the reconsideration of which will affect BLM's decisionmaking on remand. Therefore, the Ninth Circuit's remand of the decision to the agency was not only proper, but was indeed required.

A. Remand Is Required to Remedy BLM's Faulty Appraisal

Just as in any real estate transaction, an accurate appraisal is a foundational prerequisite to finalizing an exchange of federal land under FLPMA because it greatly affects bottom-line decisionmaking by federal agencies. Consequently, an agency's reliance on a legally deficient appraisal is a significant error requiring remand for correction.

For example, in *Desert Citizens*, 231 F.3d at 1187, a landfill appraisal case with many parallels to this proceeding, the Ninth Court held that "[t]he action of the BLM was arbitrary and capricious in not, at the very least, considering landfill use as the highest and best use of the [proposed exchange lands]." *Id.* It therefore remanded the case for reconsideration in light of an accurate appraisal. *Id.* Likewise, in the present case, the Ninth Circuit found that "the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration," and on that basis invalidated and remanded BLM's inaccurate appraisal for correction. Pet. App. 20.

In an incomplete attempt to remedy the faults in its original appraisal (the Yerke appraisal), BLM commissioned a second appraisal, entitled the Herzog report, during the course of the present litigation. Pet. App. 19, fn. 5. Kaiser relies heavily on the Herzog report in claiming that remand for preparation of a full and accurate appraisal is not required. Pet.

25-26. The Herzog report, however, does not fix the problems with the Yerke appraisal for two reasons.

First, as explained by the Ninth Circuit, the Herzog report was never considered by BLM in relation to the decision to approve or disapprove the dump: "[t]here is nothing in the record to indicate that the BLM has rendered a final, appealable decision on an appraisal that properly considers landfill use as a highest and best use." Pet. App. 19-20, fn. 5. Thus, the information in the Herzog report consists of nothing more than post-decisional rationalizations, the use of which has been soundly rejected by this Court.[6]

As pointed out by the Ninth Circuit here, the present situation differs markedly from cases where an agency conducts the required research and analysis and then *reconsiders* the project based thereon. For example in *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000), the agency (1) "prepared an additional [supplemental information report]

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[6] *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (when reviewing an agency decision, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *see also Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 450 F.3d 930, 943 (9th Cir. 2006) ("Parties may not use 'post-decision information as a new rationalization either for sustaining or attacking the Agency's decision,'" *citing Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th Cir. 1980); *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996)

and several other analyses that specifically addressed the deficiencies" identified by the Court and (2) completed all of the statutorily required decisionmaking processes applicable in that case during the course of the litigation. Pet. App. 19, fn. 5. The Court held that any remand under those circumstances "is unwarranted and serves no legitimate purpose." *Friends of the Clearwater*, 222 F.3d at 559. Thus, under *Friends of the Clearwater*, if BLM had *re*-approved the land exchange in reliance on the Herzog report and followed the required FLPMA processes in doing so, then it would be able to claim that remand would be futile. *Id.* However, BLM's attempt to inject a newly prepared, *internal* report into pending court proceedings, without conducting a formal reconsideration subject to public review and comment as required by BLM's own regulations,[3] does not remedy the problems with the first appraisal identified by the Court. BLM's failure to consider the new appraisal *in a decisionmaking process* that meets FLPMA standards precludes a judicial determination that the agency has already done the requisite work that a remand would require. Pet. App. 19, fn. 5, *citing Center for Biological Diversity*, 450 F.3d at 943. Thus, remand here is both warranted and will serve a very "legitimate purpose" by providing BLM decisionmakers with an accurate estimate of the exchange properties'

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[3] 43 C.F.R. §§ 2201.2, 2201.7-1; *see also* 2201.3-4 (describing appraisal review processes that BLM also failed to follow for the Herzog report).

values prior to making a decision on the merits of the exchange.

Second, the Herzog report again *failed to consider landfill use as the highest and best use for the federal exchange lands*. Rather than conduct this omitted analysis, it impermissibly attempts to excuse the Yerke appraisal's failure to do so. Pet. 11-12. Because the Herzog report ignores the Ninth Circuit's ruling, it fails to remedy deficiencies in the Yerke appraisal. Pet. App 8, fn. 1. As a result, Kaiser's argument that remand of this issue would be futile because the Herzog report answers the questions posed by the Ninth Circuit on remand is dead wrong. Pet. 25, citing Pet. App. I, J. The Ninth Circuit remanded the case to BLM for preparation of an accurate appraisal that meets FLPMA's requirements – an action that BLM has failed to undertake in *either* the Yerke appraisal *or* the Herzog report.

B. Remand Is Required to Remedy BLM's Unreasonably Narrow Statement of Purpose and Need and Its Resulting Inadequate Analysis of Alternatives

1. The Harmless Error Rule Does Not Apply to an Agency's Failure to Consider an Adequate Range of Alternatives

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves

unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(C)(iii) and (2)(E). The first step in the analysis of alternatives is the definition of the purpose and need of the project. *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960-961 (7th Cir 2003) In *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 667 (7th Cir. 1997), the Seventh Circuit emphasized the critical nature of this process:

> When a federal agency prepares an [EIS], it must consider "all reasonable alternatives" in depth. 40 C.F.R. § 1502.14. No decision is more important than delimiting what these "reasonable alternatives" are. That choice, and the ensuing analysis, forms "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. To make that decision, the first thing an agency must define is the project's purpose. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991). The broader the purpose, the wider the range of alternatives; and *vice versa*. The "purpose" of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). *The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.*

> *Nor can the agency satisfy the Act.* 42 U.S.C. § 4332(2)(E).

Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, 666 (7th Cir. 1997), emphasis added.

As discussed above, Kaiser does not directly challenge the Ninth Circuit's substantive ruling; it challenges only the Court's decision to remand. Pet. i, 18. Accordingly, Kaiser's main contention is that BLM's refusal to consider any off-site alternatives is harmless error and thus remand would be inappropriate. *Id.* In so arguing, Kaiser ignores *every* case in which a reviewing court determined that if an agency's statement of purpose and need were excessively narrow and consequently its analysis of alternatives was improperly constrained, remand is required.[4]

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[4] *See, e.g., Simmons*, 120 F.3d at 667 (an agency cannot define its objectives in unreasonably narrow terms and remand is required when it thereby circumvents consideration of reasonable alternatives); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346, 349-350 (8th Cir. 1972) (same), *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998) (same); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1098, fn. 5 (9th Cir. 2006) (same); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (same); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) (same); *Citizens' Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1030 (10th Cir. 2002) (same); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (same); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) (same); *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573, 575-576 (5th Cir. 1978) (same); *Com. of Ky. ex rel*

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Kaiser *fails to cite a single case* in which a court held that an agency failed to consider an adequate range of alternatives, but forewent remand based on its own independent determination that the faulty analysis constituted harmless error. Pet. 26-31.

Thus, based on the Ninth Circuit's holding that BLM's statement of purpose and need and alternatives analysis violated NEPA and on Kaiser's failure to challenge that substantive ruling here, remand is required BLM must analyze an adequate range of alternatives – as such analysis is "the heart of the environmental impact statement" – and reconsider its options prior to any potential re-approval of the project. 40 C.F.R. § 1502.14.

2. The Ninth Circuit Correctly Determined that BLM's Statement of Purpose and Need and Alternatives Analysis Were Improperly Limited

To the extent that Kaiser's petition raises a substantive challenge to the Ninth Circuit's ruling on purpose and need and alternatives (Pet. 26-31), Conservation Groups address those arguments here. Kaiser's collateral and confusing attack on the merits of the Ninth Circuit's ruling, however, fails to adhere to Court Rule 14, which directs: "Only the questions

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Beshear v Alexander, 655 F.2d 714, 718-719 (6th Cir. 1981) (same).

set out in the petition, or fairly included therein, will be considered by the Court."[9]

The Ninth Circuit concluded that BLM crafted "a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange. As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives." Pet. App. 29. Kaiser argues that BLM's statement of purpose and need correctly included Kaiser's goals in developing the dump at the Eagle Mountain site and therefore properly limited *BLM's* consideration of alternatives to proposals that would fulfill *Kaiser's* private goals. Pet. 26-31. Kaiser's contention is contrary to controlling case law.

The Ninth Circuit's opinion correctly states the standard for determining the adequacy of an agency's statement of purpose and need:

> Our task is to determine whether the BLM's purpose and need statement properly states the BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives.

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[9] Pacific Legal Foundation's ("PLF's") *amicus curiae* brief also violates this Court's rules by challenging the merits of the Ninth Circuit's ruling instead of addressing the narrow procedural questions presented by Kaiser. Rule 37 (briefs of *amici curiae* must contain "relevant matter").

Pet. App. 28. This statement is based on the well-established principle that "an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered." *City of New York*, 715 F.2d at 743.[10] Further, as here, "[w]hen the proposed action . . . is an integral part of a coordinated plan to deal with a broad problem, [disposal of Southern California trash,] the range of alternatives that must be evaluated is broadened." *'Ilio'ulaokalani*, 464 F.3d at 1098, *quoting City of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999); *NRDC*, 458 F.2d 827, 835. While agencies enjoy deference in defining their objectives and alternatives, "[d]eference . . . does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies." *Burlington*, 938 F.2d at 196.

The Department of Interior's NEPA Handbook, on which the Ninth Circuit properly relied, instructs that "the purpose and need statement for an externally

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[10] *See also, Simmons*, 120 F.3d at 666, *Friends of Southeast's Future*, 153 F.3d at 1067; *'Ilio'ulaokalani*, 464 F.3d at 1098, fn. 5; *City of Carmel-By-The-Sea*, 123 F.3d at 1155; *Sylvester v. United States Army Corps of Eng'rs*, 882 F.2d 407, 409 (9th Cir. 1989); *Citizens Against Burlington, Inc. v Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), *City of New York*, 715 F.2d at 743, *Highway J Citizens*, 349 F.3d at 960-961; *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002); *EDF*, 473 F.2d at 349-350; *NRDC*, 458 F.2d at 834; *Citizens' Committee to Save Our Canyons*, 297 F.3d at 1030, *Grazing Fields Farm*, 626 F.2d at 1072; *Save Our Sycamore*, 576 F.2d at 575-576; *Com. of Ky ex rel. Beshear*, 655 F.2d at 718-719

generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need.*" Pet. App. 26-27, emphasis in the original. The Handbook further clarifies: "The applicant's purpose and need may provide useful background information, but this description must not be confused with the BLM purpose and need for the action. . . . It is the BLM purpose and need for action that will dictate the range of alternatives. . . ." *Id.* BLM ignored these instructions and instead adopted Kaiser's private goals as its own and thereby eliminated consideration of any offsite alternatives. Pet. App. 27-29.

In arguing that the Ninth Circuit's holding was incorrect, Kaiser obfuscates the pivotal distinction between *acknowledging* private purposes and being *constrained* by them. Pet. 26-31. Yet all Circuit Courts agree that the government must consider the private interests driving the project proposed, but *not eliminate viable alternatives to the project that would better serve the public's interests.*[11] For example, in *Roosevelt Campobello International Park v. EPA*, 684 F.2d 1041, 1044 (1st Cir. 1982), the Environmental Protection Agency ("EPA") considered a specific development proposal from a private party for an oil refinery and deep water terminal in Eastport, Maine. *Id.* In accordance with NEPA, EPA considered a wide range of alternatives, including three alternative

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[11] *See, e.g.*, cases cited in footnote 10.

sites, Portland, Machias, and Penobscot/Blue Hill, with the specific goal of comparing the environmental impacts of development in the proposed location versus the impacts in the three other locations. *Id.* The Court upheld EPA's analysis as presenting an adequate range of alternatives. *Id.* Accordingly, the Ninth Circuit's reiteration of the standard rule was not in error: "[r]equiring agencies to consider private objectives . . . is a far cry from mandating that those private interests define the scope of the proposed project." Pet. App. 24-25.

The cases cited by Kaiser do not present a different rule or create a conflict among the Circuits. In fact, the cases are striking in their uniformity on this issue. For example, in *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174-1175 (10th Cir. 1999), the Tenth Circuit held that agencies "are precluded from completely ignoring a private applicant's objectives," but they cannot define the objectives of their actions in unreasonably narrow terms. *Id.* The Court specifically relied on the Seventh Circuit's holding in *Simmons*, *supra*, forbidding unreasonably narrow statements of purpose and need to assure consideration of a reasonable range of alternatives:

> As noted, [NEPA] and Center for Environmental Quality regulations require the Forest Service to study in detail all "reasonable" alternatives. The Seventh Circuit, and other courts, have interpreted this requirement to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only

> one alternative (i.e., the applicant's proposed project). *See, e.g., Simmons*, 120 F.3d at 669, *Burlington*, 938 F.2d at 195-96, *cert. denied*, 502 U.S. 994 (1991). Agencies also are precluded from completely ignoring a private applicant's objectives. We do not perceive these authorities as mutually exclusive or conflicting. They simply instruct agencies to take responsibility for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes.

Colorado Environmental Coalition, 185 F.3d at 1174-1175 (some citations omitted or modified, emphasis added). Kaiser and *amicus curiae* PLF, which relies extensively on *Colorado Environmental Coalition*, ignore the actual language of the cases they cite to their detriment. Pet. 3, 16-17; PLF *Amicus* Br. 4, 6, 11-13, and 17.[13]

Even Kaiser's formulation of the rule implicitly concedes the standard used by all Circuits, including the Ninth Circuit. It states, for example, that BLM was required to "*acknowledge* Kaiser's purposes," not

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[13] PLF and Kaiser disagree on the extent of an alleged Circuit split. Kaiser maintains that the Ninth Circuit is alone in its interpretation of the proper formulation of statements of purpose and need, while PLF argues that both the Ninth and Seventh Circuits are out of step with the rest of the nation. Pet. 21, *citing Fisher*, 869 F.2d at 1057, PLF *Amicus* Br. 16. Both are mistaken as the rule is consistently stated throughout *all* Circuits. *See* cases cited in footnote 10.

adopt or otherwise be constrained by them in selecting alternatives Pet. 27, emphasis added. Similarly, Kaiser explains that "when an agency 'is responding' to a private proposal, it is required to *discuss* the private purpose motivating the project." Pet. 3, emphasis added. Exactly right. The Ninth Circuit did not rule that an agency must ignore an applicant's goals; it simply held that BLM's wholesale adoption of Kaiser's goals was inappropriate. Pet. App. 23-29.

Additionally, in an attempt to parallel the flawed logic in the dissent below, Kaiser relies on BLM's determination under FLPMA that the land trade serves the public interest to moot the need for a searching analysis of alternatives under NEPA. Pet. 29. It claims that "it is now decisively settled that . . . there is no prospect that BLM will reverse its determination" to approve the land exchange with Kaiser – *no matter what the alternatives analysis on remand reveals. Id.* Kaiser forgets that this is *public* land and BLM's duty under both FLPMA and NEPA is to assure that the *public's* interests – not just Kaiser's – are best served by the land trade. Some alternatives may benefit the public interest *more* than the proposed project. Such *comparative* analysis is exactly the type of information that NEPA requires agencies to develop prior to approval of a project. Kaiser's conflation of the FLPMA finding of public interest and NEPA's alternatives analysis requirement illogically assumes that only Kaiser's proposed project could ever serve the public interest and thereby seeks to eliminate all other alternatives – including those offsite – before

they are even analyzed. *Id.* A FLPMA finding of public interest, however, does not somehow trump NEPA's required alternatives analysis. Such a rule "would be anathema to NEPA's 'twin aims' of informed agency decisionmaking and public access to information." *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 707 (10th Cir. 2009) (citations omitted)

And finally, Kaiser also seems to argue that all offsite alternatives to the proposed project were infeasible as they were "not 'viable' under the Management Act." Pet. 13, 29-30. This argument is false, was never raised below (Pet. App. 22-29), lacks evidentiary support from the administrative record, and is therefore utterly inappropriate in the present procedural context. As the Ninth Circuit found: "BLM proposed several alternatives . . . to meet long term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining . . . ," but summarily rejected them – *not based on infeasibility* – but "because each of these alternatives failed to met the narrowly drawn project objectives, which required Kaiser's private needs to be met." Pet. App. 28. If Kaiser had wanted to make an infeasibility argument, it should have raised it below, not in the offhand, unsupported manner that it presents in its petition. *Adarand*, 534 U.S. at 109.

Thus, contrary to Kaiser's contentions, the Ninth Circuit's holding on purpose and need and range of alternatives was proper and the case should be remanded to BLM for further consideration.

C. Remand Is Required to Remedy BLM's Inadequate Review of Eutrophication Impacts

In assessing whether an agency acted arbitrarily in its environmental review process under NEPA, the role of the court is to ensure that the agency has taken a "hard look" at the environmental consequences of its actions. If the agency has not done so, the proper remedy is remand to the agency for further proceedings.[13] Thus, in the present case, the Ninth Circuit acted in accordance with settled case law when it remanded the landfill decision as a result of its finding that BLM had not taken a hard look at eutrophication impacts. Pet. App. 32.

Kaiser asserts that BLM adequately discussed eutrophication, and that any faults in its analysis constitute mere harmless error. Pet. 31-32. It claims that the Ninth Circuit's ruling was limited only to a determination that the "form" of the EIS was improper. *Id.* But that is not the case. The Court found that BLM failed to address a wide range of the dump's impacts, stating that "the discussion of

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[13] *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996) (the Army Corps of Engineers did not take a hard look at zebra mussel infestation, and was instructed to do so on remand, *citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)); *State of California v. Block*, 690 F.2d at 761; *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1043 (D.C. Cir. 1973); *Center for Biological Diversity*, 623 F.3d at 642-643; *NRDC*, 458 F.2d at 838.

eutrophication is *neither full nor fair*." Pet. App. 31-32, emphasis added. As noted by the Court, BLM's scant analysis only addresses atmospheric nitrate deposition, a minute fraction of the projected eutrophication impacts the landfill will have on the surrounding desert. *Id.*; Charpied App. 18-20, 24. Furthermore, it is undisputed that BLM only applied its airborne nitrate production analysis to lands within Joshua Tree, neglecting to analyze potential impacts on other surrounding areas. Pet. App. 31. This error alone demonstrates that the EIS failed to take a hard look at eutrophication and that remand for further study is required to fulfill NEPA's call for informed decisionmaking.

Rather than "fly-specking" as Kaiser calls it, the Ninth Circuit's opinion properly requires a reasonable measure of accuracy, clarity, and completeness on the important issue of eutrophication and therefore properly remanded the case for further analysis.

IV. Lengthy Project Approval Processes Are Not Sufficient Legal Reason to Grant Certiorari

Kaiser, the *amici curiae*, and Judge Trott's lengthy dissent all insinuate that the amount of time that has expired since Kaiser's landfill project was first proposed has some bearing on the legality of BLM's analysis of the project under FLPMA and NEPA. *See, e.g.*, Pet. 32-35; PLF *Amicus* Br. 3-4, 19-21; Pet. App. 35-36. But nothing in either statute allows a free pass

once the approval process exceeds a certain time frame – indeed, to imply some sort of implicit time limit would fundamentally alter both statutes in violation of traditional norms of statutory interpretation. Instead, it is imperative that both statutes be strictly enforced. Furthermore, the length of time that the project will function and have a detrimental effect on the environment – *approximately 120 years* – counsels prudence and a full, complete, and legally-sound evaluation of the project prior to approval. Pet. App. 6. Rushing to judgment here as a form of compensation for past delays could condemn one of the nation's most spectacular national parks to 12 decades of degradation and deterioration.

Further, Kaiser, *amicus curiae* LA Sanitation, and Judge Trott's dissent all claim that Kaiser's landfill proposal is a "critical project" that will provide "desperately needed landfill space." Pet. 35; LA Sanitation *Amicus* Brief 9; Pet. App. 46-47. The record demonstrates, however, that this Project does not respond to an imminent landfill crisis. Pet. App. 24, 27, and 45. Most prominently, BLM's Record of Decision ("ROD") itself presents a multitude of available long-term planning solutions. BLM acknowledged that "[p]roposed regional landfills at other locations outside of Riverside County would, if successful, help . . . to address the Southern California region's long-term waste disposal needs. . . ." Pet. App. 231-32. The ROD dismisses these other landfills, however, because "they would not accomplish the reclamation of the Kaiser mine site." *Id.*

Yet BLM's ROD acknowledges that there are other landfill sites in San Bernardino County and the "approved Mesquite Landfill in Imperial County," as well as available landfill capacity outside of California, as other options for long-term disposal – but again dismisses those options because they do not meet *Kaiser's private goals*. *Id.* Furthermore, the ROD dismisses the potential of conservation and landfill mining partially because these alternatives "would not address one of the objectives of the Project, the reclamation of the former Kaiser mine site." Pet. App. 233. Additionally, the EIS acknowledges significant and continuing source reduction as a result of the California Integrated Waste Management Act, including "decreases attributable to increased source reduction, recycling and composting activities, and a prolonged statewide economic recession." Pet. App. 337.

BLM's own analysis thus demonstrates that many options existed at the time of project approval – some of which have been pursued and are now operational, such as the Mesquite Regional Landfill project (LA Sanitation *Amicus* Brief 6) – to address any shortfall in capacity caused by the delays in the present project.

CONCLUSION

The Ninth Circuit's Opinion does not conflict with other Circuit Courts' rulings, is based on well-established and noncontroversial statements of FLPMA and NEPA jurisprudence, and does not identify mere harmless errors. Therefore the petition for a writ of certiorari should be denied.

Respectfully submitted,

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